# Regulatory Negotiation

## Reg-Neg PIC

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#### The United States Department of Education ought to initiate a process of regulatory negotiation with public colleges and universities over whether public colleges and universities ought not <> and implement the results of the negotiation.

#### Department of education reg neg creates better rules.

Hillstock 14 Laurie G, faculty member and administrator in higher education for over 15years.  Most of her experiences have been in the distance learning arena, focusing on strategic planning (i.e., organizational structure, policy, accreditation, and funding models), faculty and curriculum development, marketing, and student success. She has also taught a number of credit bearing courses in the online, hybrid, and web-enhanced learning environment. Dr. Hillstock currently serves as a mentor for the SLOAN C Certificate program as well as a content developer and workshop facilitator for other SLOAN C workshops, including the Online Leadership series. Dr. Hillstock holds a Ph.D. in Educational Leadership (Higher Education) and M.A. in Human Resource Development from Clemson University. She also holds a B.A. in English (minor: Computer Science) from Converse College. “What is Negotiated Rulemaking and How Does It Work Anyway?” June 07, 2014. https://onlinelearningconsortium.org/negotiated-rulemaking-work-anyway/ SA-IB

A few weeks ago, the U.S. Department of Education (the Department) rulemaking panel met to discuss a number of items, but did not reach final consensus regarding state authorization for colleges that operate distance-education programs within other states. As a result, any new, proposed regulations will be left to the discretion of the Department. This indecision has raised awareness and left some wondering what negotiated rulemaking really is and how it works. So, here is a quick rundown…. Let’s start first with a definition. Negotiated rulemaking (a.k.a. regulatory negotiation or reg-neg) is a process where an organization or agency develops a proposed rule. A number of agencies have used and been quite successful with reg-neg, including the Federal Aviation Administration, Occupational Safety and Health Administration, and Environmental Protection Agency. With negotiated rulemaking, typically a committee is formed consisting of members representing the various groups that the proposed regulation itself may affect. An impartial facilitator is also identified. The general public may observe during meetings and usually at the end of each meeting, the committee offers an opportunity for public comment. Printed resources are available online on the appropriate agencies website. The negotiated rulemaking process itself may be defined as a consensus-based process, as the ultimate goal is for the members of the committee to reach consensus regarding the proposed rule. The beauty of such a process is that stakeholders have a chance to try to reach agreement about the proposed rule before a final rule is formed. In addition, when successful, reg-neg can lead to better rules for everyone involved. Now, let’s look at how this relates to distance education… As per the Office of the Federal Register (OFR), in May 2012 the U.S. Department of Education announced the intent to form a negotiated rulemaking committee to consider proposed regulations that would help prevent fraud and ensure appropriate use of Title IV Federal Student Aid program funds, especially within the “context of current technologies”. More specifically, the proposed regulations were to address the use of debit cards to distribute such funds. Later, in April 2013, several topics were added for consideration of the negotiated rulemaking committee, including items related to state authorization for programs offered through distance education. Requests for nominations took place in the Fall 2013 and by Feb 2014, the negotiated rulemaking panel was formed. Marshall Hill (Executive Director of NC-SARA) and Russ Poulin (Interim Co-Executive Director for WCET) represent the field of distance education. Though negotiating committees usually meet for three sessions, this particular committee met on four occasions, once per month from Feb 214 to May 2014.

#### It competes –

#### 1. Plan happens immediately, reg-neg takes 6 months

#### 2. Reg-neg has a chance of not resulting in the plan

#### Federal action is key to solvency – avoids circumvention.

Winkler 09 Adam, professor of Law at UCLA. “Free Speech Federalism” Michigan Law Review, vol 108, no 2. November 2009. SA-IB

The identity of the governmental institution behind a law restricting free speech rights may nonetheless be a significant, if hidden, factor in free speech cases. In this Article, I report the results of an empirical study of free speech decisions in the federal courts and reveal the ways in which the level of government behind a speech law - federal, state, or local - affects the degree of constitutional protection. This study shows that speech restrictions adopted by the federal government are far more likely to be upheld than speech restrictions adopted by other levels of government. Between 1990 and 2003, federal speech restrictions were upheld in 56% of federal court rulings, while only 24% of state speech restrictions were upheld. Even more striking is the fate of speech restrictions adopted by local governments; these were invalidated in almost every case, with only 3% surviving judicial review. In short, the level of government is a very good predictor of whether a speech restriction is likely to be upheld by the federal courts. This Article details these findings and considers potential explanations for, and implica- tions of, this "free speech federalism.”

#### The plan is circumvented without DOE rules.

Hardiman 15 Kate, professor at the University of Notre Dam. “Welcome to college – now be quiet!” The College Fix. August 2015. https://www.thecollegefix.com/post/23862/

A majority of universities across the nation continue to infringe upon their students’ First Amendment right to free speech, according to a 2015 survey of campus policies published by the Foundation for Individual Rights in Education. Once bastions of free expression and open debate, modern American universities prohibit speech in a variety of ways to protect students from ideas some deem “offensive,” “harmful” or “upsetting.” According to the foundation’s report, “Spotlight on Speech Codes 2015: The State of Free Speech on Our Nation’s Campuses,” nearly 55 percent of the 437 universities analyzed have “policies that clearly and substantially prohibit protected speech,” earning the group’s “Red Light” designation. FIRE conducts a yearly free speech review of the nation’s universities to assess their adherence to the First Amendment, and this year’s stats showed nominal improvement over previous ones. “Last year, that figure stood at 58.6 percent; this is the seventh year in a row that the percentage of schools maintaining such policies has declined,” the group noted. But don’t pop the champagne cork just yet. The foundation’s president, Greg Lukianoff, co-penned a cover story for The Atlantic this month which warns the tide has turned so far that now some students want protection from other students’ and professors’ “scary ideas.” “A movement is arising, undirected and driven largely by students, to scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense,” he wrote. “This new climate is slowly being institutionalized, and is affecting what can be said in the classroom, even as a basis for discussion.” **While the percentage of** higher education institutions with **restrictive speech codes appears to have declined** over the past six years, FIRE reports that **many speech codes may** simply **have been rebranded as “anti-harassment policies” following pressure from the Department of Education**’s Office for Civil Rights. **Universities even hold faculty training sessions to familiarize them with new anti-harassment policies**, such as the University of California’s microaggression training seminars for faculty leaders. In these sessions, professors were taught that saying “America is the land of opportunity” is an offensive “microaggression.”

#### Reg-neg increases legitimacy in rule-making.

Freeman et al 2k Jody Freeman, Professor of Law, University of California, Los Angeles. Laura Langbein, Professor, School of Public Affairs, American University. “REGULATORY NEGOTIATION AND THE LEGITIMACY BENEFIT” Harvard Law Review. Volume: Vol. 9, Issue 1. Year: 2000. http://www.law.harvard.edu/faculty/freeman/legitimacy%20benefit.pdf SA-IB

In our view, empirical studies of negotiated rulemaking that examine cost, time, and litigation rates tell only part of the story and, we believe, not the most important part. The studies summarized here go beyond these limited measures of success and provide a more textured picture of regulatory negotiation. Along virtually every important qualitative dimension, all participants in this study—whether business, environmental, or government—reacted more favorably to their experience with negotiated rules than do participants in conventional rulemak ing.10 Contrary to the critics’ expectations, Kerwin and Langbein found that negotiation of rules reduced conflict between the regulator and regulated entities, and it was no less fair to regulated entities than conventional rulemaking.11 The data contradict claims that regulatory negotiation abrogates an agency’s responsibility to implement laws written by Congress;12 indeed, the process may better enable the agency to fulfill that role. Regulatory negotiation clearly emerges, moreover, as a superior process for generating information, facilitating learning, and building trust.13 Most significantly, consensus-based negotiation increases legitimacy, defined as the acceptability of the regulation to those involved in its development.14 This legitimacy benefit, which was observed independently of the types of rules chosen for conventional versus negotiated rulemaking, and independently of differences among the participants, including their affiliation,15 is no small accomplishment and we argue that, in any event, it is more important than reducing transaction costs.

#### The counterplan bolsters inclusivity of many voices.

Freeman et al 2k Jody Freeman, Professor of Law, University of California, Los Angeles. Laura Langbein, Professor, School of Public Affairs, American University. “REGULATORY NEGOTIATION AND THE LEGITIMACY BENEFIT” Harvard Law Review. Volume: Vol. 9, Issue 1. Year: 2000. http://www.law.harvard.edu/faculty/freeman/legitimacy%20benefit.pdf SA-IB

2. Reg Neg is Broadly Inclusive The data call into question the validity of the criticism that reg negs involve only highly organized and well-financed interests.97 The majority of respondents reported participation by all parties, including small, seemingly ad hoc citizen groups, small businesses, and local government representatives.98 These types of participants were not in the majority, but neither were they rare. The data therefore support the proposition that negotiated rulemaking is at least open to groups that complain about exclusion from other governmental processes, even if those groups are imperfect surrogates for “ordinary citizens.” When asked whether all the interests that should have been involved in the negotiated rulemaking were involved, 65% of respondents answered that there was full representation.99 The literature on reg neg also identifies as a potential problem EPA’s unwillingness to commit, up front, to accept the results of negotiations and use them as the basis for the rule. There is no evidence, however, that this factor affected parties’ decisions to participate. In fact, no respondent expressed concerns in this regard.100

#### The process increases education about the rules being formed.

Freeman et al 2k Jody Freeman, Professor of Law, University of California, Los Angeles. Laura Langbein, Professor, School of Public Affairs, American University. “REGULATORY NEGOTIATION AND THE LEGITIMACY BENEFIT” Harvard Law Review. Volume: Vol. 9, Issue 1. Year: 2000. http://www.law.harvard.edu/faculty/freeman/legitimacy%20benefit.pdf SA-IB

7. More Interaction Builds Relationships and Increases Commitment to a Successful Result Data from the interviews indicate that reaching agreement was perceived to be more important to some participants than to others. Respondents explained the difference by citing a variety of reasons, including the impact of the rule on one’s organization (34%), commitment to the reg neg process (21%), and the desire to eliminate uncertainty (12%).121 Of those who noted “commitment to the process” as the reason why reaching agreement was important, several noted that the longer and harder the group worked, and the more they developed working or personal relationships with other participants, the more important a successful result became.122 This finding underscores how group dynamics can compete with the substance of issues as a factor in consensus building. However, the research also demonstrated that commitment to the process had no detectable independent effect on the respondent’s overall evaluation of the reg neg process. This sug- gests that “commitment may be important for bringing closure to the process, but is neutral with respect to the overall evaluation of the process and outcome.”123 8. Regulatory Negotiation is a Powerful Vehicle for Learning Participants generally reported that they learned a great deal during the course of a negotiated rulemaking. Among the most frequently reported forms of learning were technical or scientific aspects of the rule (21% of mentions), the issues associated with the rule (11%), the positions of parties other than themselves and reasons why these positions were taken (30%), and how negotiation actually works (18%).124 Notably, the most frequently cited source of learning was the other participants in the reg neg (45% of mentions), cited nearly four times as often as the EPA.125 This contradicts the criticism in the scholarly literature that reg neg does not help parties acquire the scientific and technical information they need to be effective in rulemaking.126 However, several respondents noted that the volume of information introduced during the reg neg, and its complexity, was very difficult to absorb.

### A2 Won’t Conclude Aff

## Theory F/L

### Counter-Interp:

### A2 Clash

### A2 Ground